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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 ERNEST A. LANTZ and MALLE O.
12 LANTZ,

No. C 05-02698 CRB

ORDER OF REMAND

13 Plaintiffs,

14 v.

15 DAIMLERCHRYSLER CORP., et al.,
16 Defendants.
17

18 Now before the Court is plaintiff's motion to remand this case to state court. After
19 carefully considering the papers submitted by the parties, the Court concludes that oral
20 argument is unnecessary, see Local Rule 7-1(b), and grants the motion to remand for the
21 reasons set forth below.¹

BACKGROUND

22 On June 30, 2005 Defendant DiamlerChrysler removed this case from the San
23 Francisco County Superior Court, where the case was scheduled to go to trial on July 11,
24 2005. Removal was based on diversity jurisdiction, as plaintiffs are citizens of California
25 and defendant DaimlerChrysler is a citizen of Michigan. In the Notice of Removal,
26 DiamlerChrysler claimed that, although other non-diverse plaintiffs were originally named in
27 the action, all of those defendants had been dismissed. It based this assertion solely on
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¹Plaintiff had also requested that his motion be heard on an expedited basis because of his poor health. Because the Court finds oral argument unnecessary, that request is moot.

1 plaintiff counsel's statement at a trial setting conference that there was only one defendant
2 remaining in the action.

3 In fact, counsel's statement was inaccurate. Plant Insulation Co., a California
4 Corporation, remained a named defendant in the lawsuit that had not yet been dismissed.
5 Plant Insulation was properly served but had never answered. Plaintiffs state that they plan
6 on seeking default judgment against plant insulation.

7 DISCUSSION

8 DiamlerChrysler makes two new arguments, not present in their removal notice,
9 supporting their contention that this Court has jurisdiction over this case. First, they argue
10 that Plant Insulation is a sham defendant that was fraudulently joined to prevent removal.
11 Second, they claim that plaintiffs abandoned their claims against Plant Insulation.

12 With respect to fraudulent joinder, the burden on DiamlerChrysler is a heavy one. A
13 defendant is deemed to be fraudulently joined "if a plaintiff fails to state a cause of action
14 against a resident defendant, and the failure is obvious according to settled rules of the state."
15 McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987) (citing Moore's
16 Federal Practice (1986) para. O. 161[2]). In meeting its burden, DiamlerChrysler need not
17 show that Plant Insulation was joined for the purposes of preventing removal, but instead
18 "must demonstrate that there is no possibility that the plaintiff will be able to establish a
19 cause of action in state court against the alleged sham defendant." Good v. Prudential Ins.
20 Co. of America, 5 F. Supp. 2d 804, 807 (N.D. CA 1998). A nondiverse defendant is deemed
21 a sham if "after all disputed questions of fact and all ambiguities in the controlling state law
22 are resolved in the plaintiff's favor, the plaintiff could not possibly recover against the party
23 whose joinder is questioned." Kalawe v. KFC Mgmt. Co., 1991 WL 338566, at *2 (D. Haw.
24 1991) (citing Kruso v. Int'l Telephone & Telegraph Corp., 872 F.2d 1416, 1426 (9th Cir.
25 1989)). The failure to state a claim against the nondiverse defendant must be "obvious
26 according to the well-settled rules of the state." United Computer Sys., Inc. v. AT&T Corp.,
27 298 F.3d 756, 761 (9th Cir. 2002).

1 DiamlerChrysler has not met this burden. It bases the claim of fraudulent joinder on
 2 plaintiffs' purported failure during discovery to produce any evidence linking Plant
 3 Insulation to the injuries alleged in the complaint. This is, however, not the forum to
 4 adjudicate the sufficiency of plaintiffs' evidence of causation.² Plant Insulation has not
 5 answered and therefore faces default. Under those circumstances, all material allegations in
 6 the complaint regarding liability will be deemed admitted. See, e.g., Weiss v. Blumencrane,
 7 61 Cal.App.3d 536, 542 n. 9 (Cal. Ct. App. 1976).

8 DiamlerChrysler argues that plaintiff's counsel is insincere in claiming that they plan
 9 to move for a default judgment against Plant Industries. However, this Court must resolve
 10 such credibility determinations in plaintiffs' favor. DiamlerChrysler's argument that
 11 plaintiffs' abandoned their claims against Plant Industries fails for the same reason. The
 12 Court must accept as true plaintiffs' claim that they have not abandoned their claims against
 13 Plant Insulation. Indeed, the Court finds nothing in the record that conclusively establishes
 14 that those claims were abandoned. Although DiamlerChrysler claims that counsel's oral
 15 statement to the Superior Court somehow had the legal effect of a voluntary dismissal, it is
 16 far from clear that counsel intended to do so, or that the Superior Court understood her to
 17 have done so. Indeed, it appears that counsel simply misspoke.

18 CONCLUSION

19 For all of the reasons stated above, plaintiff's motion to remand is GRANTED.

20 **IT IS SO ORDERED.**

21
 22
 23 Dated: July 8, 2005


 24
 25 CHARLES R. BREYER
 26 UNITED STATES DISTRICT JUDGE

25 ²Even if it were necessary for this Court to reach such issues, it would be sufficient that
 26 plaintiffs have articulated a valid theory of causation against Plant Insulation: that Mr. Lantz was
 27 exposed to asbestos produced by the company while working at the Hunter's Point Naval
 28 Shipyards. While DiamlerChrysler may be right that admissions by Mr. Lantz' and plaintiffs'
 expert make it unlikely that plaintiff would prevail on such a claim, it cannot be said that it is
 impossible for causation to be shown. For example, although Mr. Lantz could not during his
 deposition recall being exposed to asbestos thermal insulation at Hunter's Point, it still may be
 the case that he in fact was exposed without knowing, or that he simply forgot.

United States District Court

For the Northern District of California

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